NO. 21829

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS SWEENEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO
Assistant U. S. Attorney,
Chief, Criminal Division,
THOMAS H. COLEMAN,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America

NO. 21829

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS SWEENEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO
Assistant U. S. Attorney,
Chief, Criminal Division,
THOMAS H. COLEMAN,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 21829

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS SWEENEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION

An indictment in two counts charging appellant (hereinafter sometimes referred to as defendant) with receiving, concealing and facilitating the transportation and concealment of marijuana was returned by the Federal Grand Jury, and filed in the District Court on November 2, 1966 (Clerk's Transcript [hereinafter abbreviated C. T.], p. 2). Both counts of the indictment charged a violation of 21 U. S. C. 176(a), Count One charging the receipt, concealment, and facilitation of receipt and concealment of approximately 27, 953 grams of marijuana, and Count Two

charging the same illegal acts as to 1,309 grams thereof. The indictment charged that the violations in question were committed on or about September 14, 1966, by the defendant Thomas Sweeney (a/k/a Thomas Hodges).

After a jury trial which commenced on December 20, 1966, before the Honorable Jesse W. Curtis, United States District Judge, a verdict was returned. on December 23, 1966, finding the defendant guilty as charged on both counts (C. T. p. 28).

On January 23, 1967, the defendant was sentenced to five years in the custody of the Attorney General on each count of the Indictment, the sentences to run concurrently (C. T. p. 33).

On February 2, 1967, the appellant mailed a letter to Judge Curtis, which by order of the District Court, was filed as a notice of appeal (C. T. p. 32). By Order filed February 15, 1967, in the United States District Court (C. T. p. 34), Judge Curtis denied appellant leave to proceed in forma pauperis, upon the ground that the appeal was frivolous, and not taken in good faith. By Order filed May 17, 1967, in this Court, appellant was granted leave to proceed in forma pauperis.

Jurisdiction of the instant matter rests upon 28 U. S. C. 1291.

II

STATUTES AND RULES INVOLVED.

A. 21 U.S.C. 176(a) provides, in pertinent part, as follows:

> "Notwithstanding any other provision of law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marijuana contrary to law, or smuggles or clandestinely introduces into the United States marijuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.00 . . . "

B. Amendment Six to the United States Constitution provides, in pertinent part, as follows:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, . . . and to be informed of the nature and cause of the accusation; . . . "

C. Rule 10, Federal Rules of Criminal Procedure, provides as follows:

> "Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead."

D. Rule 43, Federal Rules of Criminal Procedure, provides in pertinent part, as follows:

> "The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict . . . In prosecutions for offenses punishable by fine or imprisonment for not more than one year or both, the Court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. . . . "

E. Rule 52, Federal Rules of Criminal Procedure, provides:

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

III

STATEMENT OF THE CASE

A. Questions Presented.

1. Whether the appellant was apprised of his constitutional rights as set forth in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, 10 A.L.R. 3d 974 (1966).

2. Whether appellant voluntarily, knowingly and intelligently waived effectuation of those rights.

3. Whether, assuming strictly arguendo that the warnings given to appellant did not comport with the requirements of the Miranda decision, supra, and there was no voluntary, knowing and intelligent waiver by appellant of effectuation of his constitutional rights, the introduction in evidence of the statements and admissions by appellant constituted harmless error.

4. Whether the arraignment procedure employed

herein deprived appellant of any rights provided by the Federal Constitution or by the Federal Rules of Criminal Procedure.

5. Whether, assuming strictly arguendo such a deprivation of rights, it nevertheless constitutes harmless error.

B. Statement Of Facts.

1. Re Admission of Incriminating Statements.

As is reflected in the Reporter's Transcript of the trial proceedings herein (hereinafter abbreviated R. T.), the agents of the Federal Bureau of Narcotics who participated in the apprehension of appellant expressly and promptly gave him admonitions concerning his consitutional rights. Thus, it was testified by Agent Saiz, R. T. 72:

> "At this time Agent Lipschutz, myself, and Agent Heath approached [appellant], and Agent Lipschutz placed him under arrest.
>
> "As he placed him under arrest we then asked him to accompany us to the security office of the airlines terminal.
>
> "I then picked up the two suitcases that Mr. Sweeney had taken out of the car and we went into the security office.
>
> "At the security office Agent Lipschutz, myself

and Agent Heath again identified ourselves, showed Mr. Sweeney identification, and again Agent Lipschutz advised him at least once and possibly two or three times that he did not have to make any statements, any statements that he made could be used in a court of law against him; that he need not make any statements, and that he was entitled to an attorney if he could not afford one, that one would be appointed for him; that he was entitled to use the telephone.

"He was asked if he was aware of his constitutional rights.

"Q. Do you recall Agent Lipschutz asking him any questions?

"A. After advising him of his rights, Agent Lipschutz asked him if the two suitcases were his.

"He stated that they were, that they were his property.

"Shortly thereafter Agent Lipschutz asked him -- I beg your pardon. He asked him what the contents of the suitcases was, and he replied --

* * *

"THE WITNESS: Mr. Sweeney advised or said something to the effect, "Well, you fellows know what is in there."

At R. T. 92, Agent Lipschutz related in essence how he apprised the appellant of his constitutional rights, saying:

"At this time I advised Mr. Sweeney, I said, 'Mr. Sweeney or Mr. Hodges, or whatever your name is, you are under arrest for violation of federal narcotic laws. I would like you to accompany me and not to do anything foolish.'

* * *

"Inside the security office I advised Mr. Sweeney of his constitutional rights, he had a right to remain silent, that anything he said or did could be used against him in a court of law, he had a right to have an attorney, and that if he did not have an attorney one would be appointed for him.

"I then asked him if he understood, and he said, 'Yes.'

"I then asked him, 'What are in the suitcases?'

"Mr. Sweeney made the statement, 'You guys know what is in there.' "

Agent Lipschutz again gave essentially the same testimony pertaining to his apprising the appellant of his constitutional rights, as set forth at R. T. 120-121.

After the Government rested its case at the trial herein, the defendant took the stand and, not denying his possession of the respective quantities of marijuana which are the subject of the instant proceeding, asserted a claim of entrapment. According to appellant's own testimony, he first saw the marijuana on the morning of September 14th, the day of his arrest, at his apartment. Thus, he related, at R. T. 195:

"Well, Miss Gasson [appellant's "fiance"] came in first and proceeded back toward the bedroom [of the appellant's apartment]. Within a moment or two Dick [an alleged "friend" of appellant's who supposedly shared his apartment with appellant and Miss Gasson] came up and had the marijuana with him.

"Q. By 'marijuana' are you referring to the contents of the People's [sic] exhibits?

"A. Yes.

"Q. The prosecution exhibits over here today?

"A. Yes.

"Q. Prior to that time had you ever seen this stuff?

"A. No.

* * *

"Q. What happened then?

"A. Well, during the next 15 or 20 minutes it was packaged into two suitcases, all except the other exhibit that the prosecutor has.

"Q. The other exhibit?

"A. The small one that would not fit in the suitcase. It was suggested that I carry them in another manner. It had all been stuffed in two suitcases, if possible, which I definitely wouldn't agree to, because if they sprung open or were overweight or for some

reason or other it would present a hazard that shouldn't be there. So it was placed in the cupboard in the kitchen. [The "small" exhibit is the 1,309 grams of marijuana which is the subject of Count Two of the Indictment.]

* * *

"Q. Subsequently you went out to the airport?

"A. Yes.

"Q. At the time of your arrest did you have some conversation with Mr. Lipschutz and one or two other officers?

"A. Yes, sir.

"Q. Did they ask you anything?

"A. Many things.

"Q. In relating to the marijuana in particular, did you have any conversation with Mr. Lipschutz concerning the marijuana?

"A. Well, starting with the suitcases he asked me if I knew what was in them.

"I said, 'Yes, but, then, you already know.' I suppose I sounded a little bitter.

* * *

"Q. What [else] did you tell him?

"A. Well, they asked me if there was any more marijuana. I told them there was some in my

apartment.

"And he said, 'Well, would you cooperate with us and take us back there?'

"And I said, 'Yes, I would.' "

In other portions of his testimony, appellant related an alleged course of events by which he was purportedly entrapped into trafficking in marijuana (R. T. 183-227).

2. Re Purported Defects in Arraignment Procedure.

At the commencement of the proceedings in the trial Court, as set forth at R. T. 8 and 9, the following took place:

"THE CLERK: This is Case No. 36796.

"THE COURT: Will counsel approach the bench, please?

(Whereupon, the following proceedings were had at the bench out of the hearing of jury panel:)

"THE COURT: It appears that the defendant has not been arraigned on the superseding indictment which has been filed. Let's proceed with the arraignment.

"THE CLERK: There has been a superseding indictment brought in this matter accusing you of violating the laws of the United States, a copy of which has been handed to your counsel. Do you waive reading?

[Emphasis added.]

"MR. CUTLER: Waive reading of the Indictment.

"THE CLERK: Are you ready now to enter your plea to the superseding indictment? [Emphasis added.]

"MR. CUTLER: Yes.

"THE CLERK: How do you plead to Count 1 of the Indictment, guilty or not guilty?

"MR. CUTLER: Not guilty.

"THE CLERK: Count 2?

"MR. CUTLER: Not guilty.

"THE COURT: Very well.

"Do you stipulate we may proceed with trial at this time?

"MR. CUTLER: Yes. So stipulated.

"THE COURT: Waiving any further notice?

"MR. CUTLER: Yes.

"THE COURT: Very well. You may proceed to trial."

IV

SUMMARY OF ARGUMENT

A. The appellant was given the admonitions required by the decision of the United States Supreme Court in Miranda v.

Arizona, 384 U. S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974 (1966), and voluntarily, knowingly, and intelligently waived effectuation of his constitutional rights.

B. In light of appellant's own testimony, given by him under oath at the trial in an attempt to establish entrapment, he thereby established the fact of his knowing and intentional possession of the marijuana in question, hence rendering purely academic any dispute as to the effect of the admonitions uttered by the Federal Narcotics Agents. In these circumstances, any error of the Trial Court in admitting into evidence the testimony of the narcotics agents regarding appellant's admissions would be harmless error, within the meaning of Rule 52, Federal Rules of Criminal Procedure, and hence must be disregarded.

C. It may be inferred from the contents of the Reporter's Transcript of the proceedings below that appellant was at the bench when the arrignment procedure took place.

D. Appellant was not denied a public trial in open court by an arraignment at the bench. Hence there has been no violation of the Sixth Amendment to the Federal Constitution, nor of Rules 10 and 43, Federal Rules of Criminal Procedure.

E. The Reporter's Transcript shows that appellant's counsel was handed a copy of the Indictment (R. T. 8), in compliance with Rule 10, supra.

F. A failure to comply with arraignment requirements is a mere technical defect, not warranting a reversal unless an objection was raised when the irregularity took place.

Garland v. Washington, 232 U. S. 642, 34 S. Ct. 456, 58 L. Ed. 772 (1913).

G. In view of the fact that appellant's counsel was handed a copy of the indictment, waived reading thereof, entered pleas of not guilty as to both Counts thereof, and stipulated that trial could forthwith proceed, waiving any further notice, any irregularity in the arraignment proceeding would constitute mere harmless error, not justifying a reversal.

Rule 52, Federal Rules of Criminal Procedure.

V

ARGUMENT

I

THE WARNINGS GIVEN BY THE FEDERAL NARCOTICS AGENTS COMPLIED WITH THE REQUIREMENTS OF THE MIRANDA DECISION, AND PURSUANT THERETO, APPELLANT MADE A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER OF EFFECTUATION OF HIS CONSTITUTIONAL RIGHTS.

As pointed out in the Statement of Facts hereinabove, at several points in the Reporter's Transcript, the narcotics agents testified that the appellant was given all of the required admonitions set forth in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974 (1966). Agents Lipschutz and Saiz both testified that appellant was told that he had a right not to answer any questions and to remain

silent; that any statements made by him could be used against him in a court of law; that he was entitled to an attorney even if he could not afford one; and that he was entitled to use the telephone. (In fact, the right to use a telephone is not mentioned in Miranda, so it might be said that the warnings given went beyond the scope of the Miranda requirements.) Agent Lipschutz then asked appellant if he understood what was being said to him, and he answered in the affirmative.

In Miranda, the following law was laid down, in the Opinion of the Court delivered by the Chief Justice:

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently."

An appellant in a recent Eight Circuit case, decided after Miranda, supra, was given an admonition virtually identical to those employed by the narcotics agents in the instant matter, and the introduction into evidence of the admissions in that case was upheld.

Alexander v. United States, 380 F. 2d 33

(8th Cir. 1967).

Clearly, the letter of the law was followed in this instance.

II

BY TAKING THE STAND AND ADMITTING THE ELEMENTS OF THE OFFENSE CHARGED, ANY ERROR IN ADMITTING THE TESTIMONY OF NARCOTICS AGENTS AS TO ADMISSIONS BY THE APPELLANT IS TOTALLY HARMLESS, AND AMOUNTS TO NOTHING MORE THAN AN ACADEMIC QUIBBLE.

Obviously, the case against appellant was so clear that he elected to set up a defense, rather than challenge plaintiff's prima facie case. Thus he admitted, even alleged, that he possessed the marijuana in question, knowingly and intentionally. He chose to rest his case upon the thoroughly incredible claim that he was entrapped. Plainly, the jury did not believe him, for he was found guilty as charged, upon both counts pleaded in the Indictment. Having himself admitted, on the witness stand and under oath, to the very same acts which were the subjects of the admissions to which the narcotics agents testified, he cannot now complain of any error in the introduction into evidence of the agents' testimony concerning those admissions, even assuming, solely arguendo, that appellant did not make a voluntary, knowing and intelligent waiver, based upon the warnings given him, as required by Miranda, supra. Such error is utterly and totally without effect upon any of his substantial rights, and therefore harmless. Being harmless, it must be disregarded.

III

IT MAY BE INFERRED FROM THE CONTENTS OF THE REPORTER'S TRANSCRIPT HEREIN THAT APPELLANT WAS PRESENT AT THE BENCH WHEN THE ARRAIGNMENT PROCEEDING IN QUESTION TOOK PLACE, AND EVEN IF HE WERE NOT, THERE IS NOTHING TO INDICATE ANY FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION, NOR WITH THE FEDERAL RULES OF CRIMINAL PROCEDURE.

As pointed out in the statement of facts herein, where appellee quoted from the Reporter's Transcript at pages eight and nine thereof, the Court Clerk addressed the defendant in the second person on several occasions, while the arraignment proceeding was taking place at the bench. From this it may be inferred that the defendant was indeed present at the bench, although such is not expressly stated by the Court Reporter in the transcript of proceedings.

But even if the defendant were not present at the bench, there is nothing to indicate that any of his rights were violated, which had any substantial bearing upon the result ultimately reached in the course of the litigation, to-wit, his conviction for the crimes charged in the superseding indictment.

The Sixth Amendment requires merely that a trial be public; it does not forbid bench conferences; it does not prohibit proceedings out of the earshot of persons present in the courtroom.

The Sixth Amendment further requires that the accused shall be informed of the nature and cause of the accusation. In the instant case, as is customary, counsel for the defendant was handed a copy of the Indictment, and waived the reading thereof, as is also customary. Furthermore, counsel entered a plea of not guilty as to both counts, so it cannot be said that appellant admitted to charges the nature of which he was unaware. In these circumstances, it cannot be said that there was any error under the Sixth Amendment, and even if there were, it would be purely harmless, not affecting appellant's substantial rights, and therefore must be disregarded.

Rule 52, Federal Rules of Criminal Procedure.

It may be noted, in passing, that in his charge to the Jury, the District Court read the indictment aloud, so appellant is in no position to say that he never heard its contents (R. T. 342-343).

Insofar as is material hereto, Rules 10 and 43 embody the requirements of the Sixth Amendment as set forth above, and the same principles as discussed hereinabove are applicable in answering appellant's contention that the procedure in question violated those rules. Again, appellant suffered no substantial prejudice. Even assuming, for the sake of argument, that there had been a failure to comply with the letter of those rules, any purported error is harmless error, which must be disregarded.

Rule 52, Federal Rules of Criminal Procedure.

A case in point regarding irregularities in the arraign-

ment procedure is Garland v. Washington, 232 U. S. 642, 34 S. Ct. 456, 58 L. Ed 772 (1913). There it was held that a failure to comply with prescribed arraignment procedures is a mere technical irregularity not warranting a reversal unless an objection was raised when the irregularity took place. No such objection was interposed in this case. On the contrary, appellant's attorney stipulated that the trial could proceed, waiving any further notice, after the arraignment proceeding in question took place.

VI

CONCLUSION

For the reasons set forth hereinabove, the Judgment of conviction should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

THOMAS H. COLEMAN
Assistant U. S. Attorney